

Better Estate Planning

COMMUNITY AND SEPARATE PROPERTY IN TEXAS

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Estate Planning attempts to create an equitable compromise between minimizing the amount of taxes due, distributing the property as desired to the designated heirs and assuring a financial source of security. This fact sheet on Community and Separate Property in Texas was prepared by Eugene M. McElyea, L.L.B., College of Business, Texas A&M University and consultant to the Texas Agricultural Extension Service program for this series of fact sheets on Estate Planning.

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Community property is the basic property ownership law between husband and wife in Texas. This system developed in Texas as a result of Spanish influence upon our laws. Presently, eight states, including Texas, retain the community property system.¹ Texas, however, has developed its own laws based upon this general principle.

Community ownership in a marriage means that each spouse owns in his or her own right an equal undivided portion of all marital property. Community property is property acquired during the marriage except that which one spouse owned before the marriage or acquired during the marriage by gift, inheritance or under a will.

While this definition may seem simple, in practice it has proven to be very difficult at times to

properly apply. The problem of determining the exact nature of property arises generally when the marriage has ended by death or is nearing an end by divorce. As long as a husband and wife live together in harmony and plan properly in contemplating death, community ownership can be a very satisfactory arrangement. When the marriage breaks down or one spouse dies without a will, problems of proving the property status can be both complex and costly.

Since the character of property as separate or community is fixed at the time it is acquired by one or both spouses, it may be difficult at a distant future date to clearly establish facts that existed at acquisition time. To simplify problems of distinguishing the difference between separate and community property, the law presumes all marital property to be community unless evidence is produced clearly demonstrating its separate character.

Without maintenance of adequate financial records segregating separate assets, it is easy for them to become mingled with community funds and thus lose their separate identity. While the courts try to trace an asset to its source, it is not certain that this can be accomplished.

Recent changes in Texas law have modified the husband's traditional role as "manager" of community property. In an effort to extend more rights to married women, the law has declared that all community property is now subject to joint-management by the spouses except that each spouse, husband and wife, has sole management of his personal earnings, revenue from his separate property, recoveries for individual personal injuries and the increase of property over which he has sole management.

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¹Other states having community property are Louisiana, New Mexico, Arizona, California, Washington, Nevada and Idaho.

With this change it is interesting to note that Texas continues to regard "revenue from separate property" to be community property. Revenue from separate property representing a capital return such as payment of an oil royalty or bonus or a stock dividend is considered separate property, however, and not community.

The Texas law now gives married women the right to sue and be sued in their individual capacity. Formerly, a married woman could not sue without being joined by her husband. The power to contract has also been granted to the married woman in those areas where she has sole or joint management of the community estate. Her rights are limited in contracting with respect to those properties over which her spouse has sole management, but in certain unusual circumstances court permission may be extended whereby even in those instances she can contract. The husband has likewise been limited in his ability to contract with respect to that property over which the wife has been given sole management and control.

Third parties may now deal with either the husband or the wife and where title to property is reflected in the name of one spouse alone, a third party may rely upon the fact that the spouse appearing to have title has the sole management and control of the particular property.

Another new provision in the law permits a pre-marital agreement defining before marriage the exact nature of property owned by parties intending to marry. This agreement may be used as later evidence of the nature of their property. After marriage, a partition of community property between spouses is now permissible. Community property may be converted into separate property in this manner.

A married couple's debts are an important ownership aspect. The law now provides that a spouse's separate property is not subject to the liabilities of the other spouse unless both spouses are liable for the obligation. The community property subject to sole management of one spouse is not liable for the debts of the other spouse incurred before marriage or for liabilities the other spouse incurs *during* marriage except for torts (*i.e.* wrongs) committed against another. The com-

munity property managed by one spouse solely or jointly is responsible for debt incurred by that spouse, except that all community property is liable for the torts (*i.e.* wrongs) of either spouse committed during marriage.

Prior Texas law stating that the homestead might not be sold without the signature of both spouses has been modified to permit a sale with court permission under certain unusual circumstances and by one spouse alone in cases where the other spouse is legally declared incompetent. However, a competent spouse may not sell the homestead if it is the separate property of an incompetent spouse without court permission.

The community property ownership and control system has now been liberalized to create an equal participation by husband and wife in marriage affairs.

The hallmark of the community property system is that it is one system which has traditionally regarded the wife as an equal partner in the marriage. In this regard the wife enjoys immense advantages and under new law she has an opportunity to participate even more fully in family affairs. Perhaps the enacted changes will eliminate frustrations that occurred in prior years under the old law. No longer can a husband demand the paycheck his wife earns from her employment. In the event a wife is abandoned by her husband, she can now sell the homestead or mortgage it in order that it might be properly repaired. Leaving the wife without any management powers created many hardships in the past, but this aspect of the law no longer exists. Perhaps community management will prove a more workable and practical arrangement in the future.

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